



**ALEX KOGAN**  
SENIOR VICE PRESIDENT  
1100 NEW YORK AVENUE, N.W.  
WASHINGTON, DC 20005

October 23, 2023

Ms. Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: SR-CboeBZX-2023-063**

Dear Ms. Countryman:

The Nasdaq Stock Market LLC (“Nasdaq”) appreciates the opportunity to comment on Cboe BZX Exchange, Inc.’s (“Cboe” or the “Exchange”) proposal to adopt an alternative to the minimum \$4 price requirement for companies seeking to list Tier II securities on the Exchange (the “Proposal”).<sup>1</sup> Nasdaq is a self-regulatory organization mandated to protect investors and the public interest, and we have adopted our own minimum price requirements for companies seeking to list on Nasdaq’s listing tiers. Thus, Nasdaq brings a unique perspective to these issues.

Currently, Cboe permits the listing of a company’s primary equity security if it meets the general listing requirements applicable to Tier I or Tier II securities, which require a minimum bid price of \$4 per share, in addition to minimum numbers of publicly held shares, round lot holders and market makers. Companies must also qualify under an Equity Standard, Market Value of Listed Securities Standard, or Net Income Standard, each of which require a minimum amount of stockholders equity, market value of publicly held shares, operating history and/or net income.<sup>2</sup>

Cboe now proposes to adopt an alternative to its \$4 bid price for Tier II securities, to permit the listing of securities with a minimum closing price of either \$2 or \$3 (based on the BZX Official Closing Price).<sup>3</sup> Nasdaq is concerned that approving the Proposal would impede investor protection, capital formation and competition, as further described below.

### **Nasdaq’s Listing Rules**

Nasdaq Capital Market allows an equity security to qualify for listing with a minimum closing price of either \$2 or \$3 per share if the issuer of the security also satisfies at least one of the following requirements: (1) average annual revenues of \$6 million for the past three years; (2) net tangible assets

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<sup>1</sup> See Securities Exchange Act Release No. 34-98532 (September 26, 2023), 88 FR 67852 (October 2, 2023).

<sup>2</sup> See Cboe BZX Exchange, Inc., *Rules of Cboe BZX Exchange, Inc.*, Rules 14.8 and 14.9 (as of October 20, 2023), available at: [https://cdn.cboe.com/resources/regulation/rule\\_book/BZX\\_Exchange\\_Rulebook.pdf](https://cdn.cboe.com/resources/regulation/rule_book/BZX_Exchange_Rulebook.pdf).

<sup>3</sup> See proposed rule 14.9(b)(1)(A)(ii): A closing price of \$3 would apply to companies seeking to list under the Equity or Net Income Standards; a closing price of \$2 would apply to companies seeking to list under the Market Value of Listed Securities Standard.

of \$5 million; or (3) net tangible assets of \$2 million and a three year operating history.<sup>4</sup> Historically, any stock listed on a national securities exchange with a bid price under \$4 would be considered a “penny stock” under Rule 3a51-1(g), unless the securities exchange was “grandfathered” into the penny stock rules. NYSE Amex was grandfathered into the penny stock rules such that any securities registered on NYSE Amex are not considered penny stocks, even if they are listed with the per share price of \$2 or \$3. At that time, Nasdaq did not have a provision in its rules allowing companies to list at \$2 or \$3, but subsequently, in 2012, the Commission approved Nasdaq’s proposal to list companies with a closing price per share of at least \$2 or \$3 if they satisfied the revenue or assets test under the alternative penny stock exclusion set forth in Rule 3a51-1(g) under the Exchange Act.<sup>5</sup>

Since 2012, Nasdaq has further amended its listing rules to exclude shares subject to resale restrictions (“Restricted Securities”) from calculations of a company’s publicly held shares, market value of publicly held shares and round lot holders.<sup>6</sup> Nasdaq adopted this exclusion in 2019, and at the time, Nasdaq expressed concern that failure to exclude Restricted Securities could result in a security satisfying “the Exchange’s initial listing requirements related to liquidity and list on the Exchange, even though there could be few freely tradable shares, resulting in a security listing on the Exchange that is illiquid.”<sup>7</sup>

### **Cboe’s Proposed Listing Rules**

Cboe is proposing to adopt an alternative to its minimum \$4 bid price requirement to allow companies to qualify with a closing price of at least \$2 or \$3 per share if the company meets the same revenue or net tangible asset test adopted by Nasdaq. However, Cboe’s listing standards would not contain Nasdaq’s liquidity requirements related to Restricted Securities. Cboe reasons that the proposed “initial listing requirements are substantively identical to Nasdaq’s initial listing requirements at the time the Nasdaq proposal was approved by the Commission [in 2012],” and therefore the Commission should consider Cboe’s proposed listing standards as “substantively identical” to Nasdaq’s 2012 listing standards.<sup>8</sup>

### **Exchange Act Analysis**

In order for securities listed on Cboe to be considered “covered securities” and exempt from state blue sky requirements, Cboe’s listing standards must be “substantially similar,” rather than “substantively identical,” to those of other existing exchanges. The Commission has previously indicated that it interprets the “substantially similar” standard “to require listing standards as least as

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<sup>4</sup> See Nasdaq Listing Rule 5505(a)(1)(B).

<sup>5</sup> See Securities Exchange Act Release No. 34-66830 (April 18, 2012), 77 FR 24549 (April 24, 2012).

<sup>6</sup> See Nasdaq Listing Rule 5005(a)(38) (“Restricted Securities” means securities that are subject to resale restrictions for any reason, including, but not limited to, securities: (1) acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (2) acquired through an employee stock benefit plan or as compensation for professional services; (3) acquired in reliance on Regulation S, which cannot be resold within the United States; (4) subject to a lockup agreement or a similar contractual restriction; or (5) considered “restricted securities” under Rule 144).

<sup>7</sup> See Securities Exchange Act Release No. 34-86314 (July 5, 2019), 84 FR 33102 (July 5, 2019) at 4.

<sup>8</sup> See Proposal at 11.

comprehensive” as those of NYSE, NYSE Amex, and Nasdaq (the “Named Markets”).<sup>9</sup> In 2012, the Commission determined that BATS Exchange, Inc.’s (“BATS”) listing standards are substantially similar to the Named Markets, and amended Rule 146 under Section 18 of the Exchange Act to specify that Tier I and Tier II securities listed on BATS are deemed “covered securities,” and exempt from state blue sky requirements.<sup>10</sup> Cboe BZX Exchange, Inc. is the successor to BATS,<sup>11</sup> and as such, Cboe is now considered a “Designated Market.”<sup>12</sup>

A Designated Market that lowers its listing standards, such that they are not substantially similar to a Named Market, “may lose its status as a Designated Market.”<sup>13</sup> The Commission has stated that “the listing standards of the Named Markets serve as a lower bound for the extent to which competition may pressure listing exchanges to attempt to weaken their listing standards.”<sup>14</sup> In other words, the listing standards of existing markets are the lower bound for any new listing standards. It would be inconsistent with the longstanding principles of investor protection, capital formation and competition if the Commission were to disregard an existing exchange’s current listing standards when determining whether a new or existing exchange’s standards are substantially similar. Therefore, the Commission must consider Nasdaq’s rules as they stand at the present day, including our 2019 amendments.

In approving Nasdaq’s 2019 amendments, the Commission stated that it believes that “these amendments should help to ensure that the Exchange lists only securities with a sufficient market, with adequate depth and liquidity, and with sufficient investor interest to support an exchange listing.”<sup>15</sup> This is consistent with the Commission’s finding decades earlier in In the Matter of the Application of Rocky Mountain Power Company, where the Commission observed that demonstrating an adequate market for a company’s shares “is at the heart of this and other [Nasdaq] inclusion requirements.”<sup>16</sup> Similarly, in approving Nasdaq’s 2012 proposal, the Commission stated that:

[L]isting standards provide the means for an exchange to screen issuers that seek to become listed and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market, assuring compliance with its listing standards and detecting and deterring manipulative trading activity .<sup>17</sup>

In considering Nasdaq’s 2012 proposal, the Commission was concerned that lower priced stocks could be manipulated or artificially inflated to meet Nasdaq’s initial listing requirements. In response to these concerns, Nasdaq “amended its proposal to require a company to maintain a \$2 or \$3 closing price

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<sup>9</sup> See Securities Act Release No. 33-9295 (January 20, 2012), 77 FR 3590 (February 24, 2012) at 6.

<sup>10</sup> Id.

<sup>11</sup> See Securities Exchange Act Release No. 34-79585 (December 16, 2016), 81 FR 93988 (December 22, 2016).

<sup>12</sup> See Securities Act Release No. 33-10428 (October 24, 2017), 82 FR 50059 (November 29, 2017) at 20.

<sup>13</sup> Id. at 32.

<sup>14</sup> Id.

<sup>15</sup> See *supra* note 7 at 34.

<sup>16</sup> See *Rocky Mountain Power Co.*, Securities Exchange Act Release No. 40648, 1998 SEC LEXIS 2422; 53 S.E.C. 979 (November 9, 1998).

<sup>17</sup> See *supra* note 5 at 8.

for five consecutive business days prior to approval for listing, rather than on a single day, as proposed.”<sup>18</sup> Over time, Nasdaq observed that illiquid securities could also present potential for price manipulation. In 2019, Nasdaq noted that “[i]lliquid securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result in trading at a price that may not reflect their true market value. Less liquid securities also may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices.”<sup>19</sup> Therefore, Nasdaq believed that excluding Restricted Securities from its initial listing calculations “will better reflect the liquidity of, and investor interest in, a security and therefore will better protect investors.”<sup>20</sup>

Nasdaq continues to believe that robust listing standards are required to promote investor protection and reduce the risk of price manipulation. Cboe’s statutory basis for the Proposal would require the Commission to disregard Nasdaq’s subsequent changes to its listing standards, including its liquidity requirements, which could seriously harm investor protection. However, if the Commission determines that the Proposal does not harm investors and approves it, then Nasdaq would need to consider revising its own listing standards in order to eliminate the incentive for regulatory arbitrage among issuers. This incentive would arise because the Proposal “creates the opportunity for an issuer to choose a listing venue with laxer standards”<sup>21</sup> and is an impediment to fair competition. As such, CBOE’s proposal is also at odds with Congress’s stated goals to foster fair competition among markets.<sup>22</sup>

## Conclusion

If the Proposal is approved, Cboe could list very small companies without the additional guardrails that Nasdaq has in place at a time when there is intense regulatory attention on potential manipulation of trading in shares of small cap companies. Nasdaq urges the Commission to disapprove Cboe’s Proposal.

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<sup>18</sup> Id. at 11.

<sup>19</sup> See supra note 7 at 4.

<sup>20</sup> Id. at 11 and 12.

<sup>21</sup> See Letter from Mr. Edward Knight, Executive Vice President, Nasdaq, Inc., to Mr. Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated March 18, 2004, available at: <https://www.sec.gov/files/rules/proposed/s70204/s70704-5.pdf>.

<sup>22</sup> See e.g., Section 11A(a)(1)(C)(ii) of the Securities Exchange Act [15 U.S.C. Section 78k-l(a)(1)(C)(ii)] (Congress finds that “[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure...fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets”).

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Alex Kogan', with a stylized, cursive script.

Alex Kogan